U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 30Aug2001

Case No.: 1999-INA-0152

In the Matter of:

ARMAND BOUZAGLOU, MD., F.A.C.R.,
Employer,
on behalf of

MARCIANO JOSE TANGONAN LAXINA, JR.,
Alien.

Appearance: Theodore A. Behlendorf, Esq.
Certifying Officer: Rebecca Marsh Day, Region IX

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of

the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

On July 8, 1999, an Order of Dismissal was issued dismissing the appeal on the grounds that the Employer did not file an appeal within 35 days of issuance of the final determination. On July 14, 1999, Counsel for Employer filed a request for reconsideration of the Order of Dismissal.[1]

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[2] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Motion for Reconsideration

The Order of Dismissal in this case was issued based upon a notation on the Motion for Reconsideration that it was filed in the Certifying Officer's office on April 1, 1998, more than seven months after the final determination was issued. (See, receipt notation on AF 6). Upon review of the documentation submitted with the motion for reconsideration, it clearly appears that such was erroneous. Employer has submitted copies of a receipt for certified mail submitted on September 24, 1997, to the Certifying Officer's address, along with a copy of the motion to reconsider dated September 15, 1997. Indeed, the record reflects that the Certifying Officer considered and denied the motion to reconsider on June 19, 1998. (AF 5).

Thereafter, on July 2, 1998, Attorney Theodore A. Behlendorf entered an appearance on behalf of the Employer and requested by that the CO should "[P]lease forward the labor certification application to the Board of Alien Labor Certification Appeals for review." (AF 3-4). On July 15, 1998, Counsel submitted a Request for Administrative-Judicial Review (AF 1). On March 9, 1999, a Notice of Docketing and Order Requiring Statement of Position or Legal Brief was issued by the Chief Administrative Law Judge. A brief was submitted by Counsel for Employer on March 24, 1999.

Therefore, the Employer's motion to reconsider the Order of Dismissal is Granted, and the appeal will be now addressed in accordance with the July 15, 1998 Request for Review.

Statement of the Case

This case arises from an application for labor certification filed by Armand Bouzaglou, Md., F.A.C.R., on February 1, 1995, seeking labor certification for Marciano Jose Tangonan Laxina, Jr.,

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[1] Apparently the formal file could not be located, as the motion to reconsider has not been considered until this decision.

[2] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Alien, for the position of Technologist Assistant Radiation Therapy (AF 33).

The duties of the job were described as follows:

> Will assist technologist in providing radiation therapy to patients, in reviewing prescriptions, diagnosis, patient chart, identification, and in setting up patient as prescribed by the doctor; will prepare equipment to be used such as LINAC, Varian 6/100 Linear Accelerator and will position patients according to prescription. Will observe and reassure all preventive and safe handling measurements with respect to hazardous materials; will develop films and replenish tanks and will prepare necessary film during actual set-up on treatment table; will cut/mold custom blocks per doctor's order.

(AF 33).

Employer did not list any educational requirements, but required that applicants have two years experience in the job offered or as "Technologist Assistant, Oncology, Radiation Therapy."

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on June 17, 1997 (AF 29). Employer submitted rebuttal on July 18, 1997 (AF 23). The CO issued a Final Determination denying certification on August 25, 1997 (AF 21). Employer requested administrative-judicial review of the denial on July 15, 1998 (AF 1).

Discussion

The CO proposed denial on the grounds that U.S. workers were rejected for other than lawful job-related reasons, in violation of 20 C.F.R. § 656.21(b)(6) and/or § 656.21(j)(i)(iii) and (iv). Specifically, the CO said it appeared that U.S. applicants Gomez and Okley were rejected for other than valid, job-related reasons. The Employer was directed to rebut the findings by explaining the lawful job-related reasons for not hiring the U.S. applicants and to give the job title of the person who considered them for employment.

Employer's rebuttal consisted solely of a six page letter from the Employer. The Employer explains that "[A]pplicant, ABEL GOMEZ, was interviewed on 08/18/95 by the employer's representative, Ms. Belle Cruz. As a result of the interview, it was determined that he does not have the required experience as called for in the job." (AF 23). Specifically, Employer argued that applicant Gomez indicates in his resume that he lacked experience in radiation therapy; that he had some training in radiology, but had only worked as a radiology assistant from 1991 to 1992; and that he admitted in the interview that he has worked in radiation therapy or a related field for less than one year.

The resume submitted by Mr. Gomez is contained in the record. (AF 58). A review of that resume supports the Employer's contention that he does not indicate that he has two years of experience in the job offered or in any form of radiation therapy. Mr. Gomez indicates that he is currently pursuing an academic radiology program as an "x-ray tech." While Mr. Gomez indicates that

he is a good student in his academic program, such does not meet the stated requirements of two years in the job offered or related radiation therapy employment. Accordingly, we find that Employer's rejection of Mr. Gomez was not unlawful.

As to applicant Caroline Okley, the Employer states that she was interviewed by telephone, and "This applicant was rejected because she simply did not possess the experience required by the position. She lacks the ability to perform the job duties as listed in the application and this constitutes the lawful rejection of this applicant by the employer." (AF 24). Specifically, the Employer states that Ms. Okley "[a]dmitted that she has very little knowledge of the cutting and molding process of custom blocks which is one of the requirements in the job offered. She does not know how to prepare equipments to be used such as linac, Varian 6/100 Linear Accelerator." Finally, the Employer argues that Ms. Okley's experience is outdated, since she has performed essentially administrative work since 1990.

The resume of Caroline Okley is contained in the record before us. (AF 67). Her resume indicates that she engaged in a two year training program in Therapeutic Radiology, and has extensive experience in radiation therapy:

> Staff Radiation Therapy technologist at New York University Hospital - 1963-1966.
> Staff Radiation Technologist at Cedars of Lebanon Hospital - 1966-1972.
> Staff Therapy Technologist at Children's Hospital, Los Angeles - 1972-1974.
> Staff Nuclear Medicine Technologist at Cedars of Lebanon Hospital - 1974-1985.

One of the reasons given by the Employer for not hiring Ms. Okley was that her experience was essentially "dated" in that she has performed administrative work since 1990. However, the requirements for the job offer make no reference to the recency of an applicant's experience. Additionally, the Employer asserts that she has little knowledge of the cutting and molding process of custom blocks or how to prepare equipments to be used such as linac, Varian 6/100 Linear Accelerator.

However, a review of the Alien's Statement of Qualifications (AF 80-81) reveals that he has had no formal training as a technologist assistant, but has worked as a Technologist Assistant since 1992 at Wilshire Oncology Medical Group and St Vincent Medical Center. The "detailed" description of this employment is as follows:

> Will assist technologist in providing radiation therapy to patients, in reviewing prescriptions, diagnosis, patient chart, identification, and in setting up patient as prescribed by the doctor.

(AF 81, items 15 a,b).

Thus, we have no evidence that the Alien has any experience in the cutting and molding process of custom blocks or preparing equipment such as linac, Varian 6/100 Linear Accelerator. Therefore, the Alien's statement of qualifications does not indicate that he has two years of experience in the duties

of the job offered. It does indicate that he has two years of experience as a technologist assistant in an oncology clinic, which just happens to be the alternative experience listed in the application for labor certification.

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94-INA-544, 95-INA-68 (Feb. 2, 1998) (*en banc*) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. The employer here did not indicate that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5).

The CO did not cite § 656.21(b)(5) or *Kellogg* in finding that applicant Okley was unlawfully rejected. However, the CO's reasoning is correct in that the Employer has unlawfully imposed requirements upon Ms. Okley, which were not imposed upon the Alien, i.e., that her experience be recent and that she must have two years of experience in the cutting and molding process of custom blocks or preparing equipment such as linac, Varian 6/100 Linear Accelerator. Upon consideration of the evidence, we find that applicant Okley's two years of formal training plus 22 years of experience as a Radiation Therapy Technologist more than qualifies her for the position of Technologist Assistant Radiation Therapy.

Additionally, we note that the CO directed the Employer to "give the job title of the person who considered them for employment." (AF 29). Employer's response to this portion of the NOF was that the interviewer was Ms. Belle Cruz, his representative. This response is evasive in that this information had already been provided in the report of recruitment, where the Employer advised that the applicants were interviewed by "the employer's representative, Ms. Belle Cruz at telephone number (310) 421-5135." (AF 50). Thus, the CO already knew that the employer was asserting that Ms. Cruz was his "representative" when the NOF directed Employer to "give the job title of the person who considered them for employment." Clearly, the qualifications of the person conducting the interviews is a relevant piece of information that the CO was authorized to require of the Employer. Employer's response evades the question and is also grounds for denial of the application.

Accordingly, we find that the CO's denial of labor certification on the grounds that applicant Caroline Okley was unlawfully rejected in violation of 20 C.F.R. § 656.21(b)(6) must be affirmed.

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.